testify on their behalf. The defence counsel in fact states that in all probability he will be so calling that person.

This man Chan Ah Kow had been charged before me also for an offence under s 39B. I have called for the records relating to his case FTCT no 39 of 1984. He was charged jointly with one Low Ee Tik with an offence of trafficking in heroin, an offence under s 39B of the Dangerous Drugs Act. He was acquitted at the close of the prosecution's case as I held the prosecution had not established a prima facie case against him. The co-accused was, however, convicted after I had heard his defence. As correctly pointed out by the DPP, Chan Ah Kow did appear as a witness for the defence in that case. I delivered a written judgment on 26 April 1988 where I convicted Low Ee Tik and in my judgment I commented adversely against and made findings which were adverse to Chan Ah Kow and I held that there was complicity on his part in the case with this Low Ee Tik.

The DPP's submission, as I understand it, is that it is likely that blame will be attributed to Chan Ah Kow. Defence counsel has agreed that in the charge in the existing case, access to the premises by person or persons other than the two accused would be relevant to the defence. As I understand it will be part of the defence that Chan Ah Kow had access to the premises where the drugs were presumably found though both the accused are charged for trafficking in them. And Chan Ah Kow in all probability will be called as a defence witness.

Now this is a court of law dealing with a case under s 39B of the Dangerous Drugs Act 1952 where no jury is provided for the trial of a case where, if the accused is convicted, it would result in the death sentence being passed. In other words in the trial under s 39B the judge is both judge of law and judge of fact. It seems to me the court would be placed in an invidious position that if the court were to acquit both the accused at the end of this case that a lingering doubt should arise or exist in the minds of the prosecution and the public that the court had acquitted them because I had previously dealt with a case where I had made certain adverse findings against Chan Ah Kow in another case and that my adverse findings had influenced my decision in this case. I cannot allow that to happen.

Public policy requires that, in order that there should be no doubt about the purity of the administration, any person who is to take part in it should not be in a position that he might be suspected of being biased: *Allinson* v *General Council of Medical Education and Registration*[1] at p 758.

I must also heed the words of the court in *Vellu Thevar* v *R*,[2] that it is a fundamental tenet of the due administration of justice that judges and magistrates should not only be fair and impartial but also should appear to reasonable persons to be fair and impartial and that neither accused persons nor litigants should have any reasonable grounds for supposing that the judge or magistrate who is trying a case in which they are concerned is biased in their favour or against them. To quote the classic words of Hewart CJ in *R* v *Sussex Justices, ex p McCarthy*:[3]

> It is not merely of some importance but of fundamental importance that justice should not only be done but should manifestly and undoubtedly have been seen to be done.

In all the circumstances and also taking into account that the defence counsel also agrees it would not be fair for me to hear the case, I disqualify myself from hearing this case.

Solicitors: *Syarikat Radhakrishnan.*

Reported by *Ng Sheau Jiuan*

Syarikat Islamiyah v Bank Bumiputra Malaysia Bhd

HIGH COURT (KUALA LUMPUR) – SUIT NO C24-3946-1986
GUNN CHIT TUAN J
5 JULY 1988

Banking – Bank paid out money on forged cheques – Whether with customer's mandate – Whether bank liable – Bills of Exchange Act 1949, ss 24, 60

Civil Procedure – Summary judgment – Appeal – Bank paid out moneyon forged cheques – Whether bank paid money without customer's mandate Defective affidavit – Whether supplementary affidavit can cure defect – Whether triable issues exist

This is an appeal against the summary judgment made against the defendant bank. The plaintiff was at all material times a customer of the bank and had a current account at the defendant's Taman Melawati branch office. The bank paid out a total sum of $26,800 on six cheques which were forged and debited the plaintiff's account for the said amount. The bank averred, inter alia, that it paid the six cheques in question in good faith and in the ordinary course of business and should therefore be protected under s 60 of the Bills of Exchange Act 1949.

Held, dismissing the appeal: (1) The object of s 60 of the Bills of Exchange Act 1949 is to protect the paying banker against forged or unauthorized indorsements. The section does not apply to forged or unauthorized signatures which are governed by s 24 of the Bills of Exchange Act 1949.

(2) The court is satisfied that there was evidence adduced to prove on a balance of probabilities in this case that the signatures on the cheques were not those of the plaintiff but were forged without the plaintiff's authority and were therefore wholly inoperative. There was therefore no mandate to the bank. The bank must therefore bear the loss and cannot debit the plaintiff's account.

(3) The filing of a supplementary affidavit to cure a minor defect in a previous affidavit did not prejudice the bank in any way.

(4) There were no triable issues. Leave for judgment should be granted for the plaintiff to enter judgment against the bank as prayed.

Cases referred to

1 *Selangor United Rubber Estates Ltd* v *Cradock & Ors* [1968] 2 All ER 1073 (distd)
2 *London Joint Stock Bank Ltd* v Macmillan & Arthur [1918] AC 777 (refd)
3 *Kepitigalla Rubber Estates Ltd* v *National Bank of India Ltd* [1909] 2 KB 1010 (refd)
4 *Tai Hing Cotton Mill Ltd* v *Liu Chong Hing Bank Ltd & Ors* [1985] 2 Lloyd's Rep 313 (folld)
5 *Les Fils Dreyfus et Cie Societe Anonyme* v *Clarke* [1958] 1 All ER 459 (folld)
6 *Begg* v *Cooper* (1878) 40 LT 29 (refd)

Legislation referred to

Bills of Exchange Act 1949 ss 24, 60
Rules of the High Court 1980 O 14 r 2(1)
UK Bills of Exchange Act 1882 s 60

Shamsul Bahrain for the defendant/appellant.
Ahmad Hisham Kamaruddin for the plaintiff/respondent.

Cur Adv Vult

Gunn Chit Tuan J: The sole proprietor of a firm trading as Syarikat Islamiyah (the plaintiff) applied under O 14 of the Rules of the High Court 1980 for leave to enter final judgment against Bank Bumiputra Malaysia Bhd (the defendant) for the recovery of $26,800 with interest at the rate of 8% pa on the judgment sum from the date of judgment until the date of realization and costs.

In an affidavit affirmed by one Teh Ah Huay *alias* Aishah bte M Eusoff Teh, the administrative manager of the plaintiff, it was averred that at all material times the plaintiff was a customer of the defendant and had a current account number 081-0029770 at the defendant's Taman Melawati branch office. The defendant paid out a sum of $26,800 on six cheques purporting to have been drawn by the plaintiff payable to bearer and debited the plaintiff's account with the said amount. The relevant particulars are as shown below:

No	*Date*	*Cheque Number*	*Amount*
1	4 September 1984	166301	$ 2,000
2	22 September 1984	166304	$ 2,000
3	24 September 1984	166321	$ 5,000
4	25 September 1984	166322	$10,000
5	27 September 1984	166323	$ 4,000
6	3 October 1984	166332	$ 3,800
			$26,800

The defendant paid out the said sum of $26,800 despite the fact that the cheques concerned were forged and debited the plaintiff's account for the said amount. In para 6 of the defendant's statement of defence filed on 21 September 1986, the defendant admitted that it had paid out the said amount on the cheques concerned and had debited the plaintiff's account with the amount thereof, but denied the averment in para 6 of the plaintiff's statement of claim that the plaintiff did not draw the said cheques or authorized the drawings thereof and that the signatures thereon were forged by some person unknown and that in the premises the defendant had no authority to pay the said cheques.

In an affidavit of one Md Yusuff bin Haji Ahmad, the branch manager of the defendant, it was averred that the defendant paid the five (sic) cheques in question in good faith and in the ordinary course of business. It was also averred that in a report lodged with the police the sole proprietor of the plaintiff had stated that the writing on the cheques in dispute was that of one Awang *alias* Che Mah bin Che Lob. The said statement is contrary to the pleading in para of the statement of claim wherein the plaintiff had pleaded that the signatures on the cheques were forged by some person unknown. The report was made to the police in 1984 with the personal particulars of the forger stated therein but since then no charges have been preferred against the said Awang *alias* Che Mah bin Che Lob who was arrested by the police but later released without being charged in court.

In his submission Encik Shamsul Bahrain, counsel for the defendant, stated that there were triable issues. First, he contended that the plaintiff must produce the cheques in question and prove forgery. He also contended that as the defendant had paid the cheques in good faith and in the ordinary course of business, the defendant was protected under s 60 of the Bills of Exchange Act 1949, which reads as follows:

> When a bill payable to order on demand is drawn on a banker, and the banker on whom it is drawn pays the bills in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the indorsement of the payee or any subsequent indorsement was made by or under the authority of the person whose indorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such indorsement has been forged or made without authority.

Counsel also referred to the judgment of Ungoed-Thomas J in the case of *Selangor United Rubber Estates, Ltd* v *Cradock & Ors*,[1] wherein his Lordship had referred to s 60 of the United Kingdom Bills of Exchange Act 1882, which is in pari materia with s 60 of our Bills of Exchange Act 1949. His Lordship had said that the object of s 60 was to protect the paying banker who pays 'in good faith and in the ordinary course of business', though negligent. It was the contention of Encik Shamsul Bahrain that that section therefore applied to an indorsement by an agent in fraud of his principal.

With respect to the contention of counsel, it must be pointed out that the object of s 60 of the Bills of Exchange Act 1949 is to protect the paying banker against forged or unauthorized indorsements. That section does not apply to forged or unauthorized signatures which are governed by s 24 of the Bills of Exchange Act 1949 which is as follows:

> Subject to the provisions of this Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorized signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up forgery or want of authority:
>
> Provided that nothing in this section shall affect the ratification of an unauthorized signature not amounting to a forgery.

In this case although it would appear that there was no or insufficient evidence to prove beyond reasonable doubt for purposes of criminal proceedings that the signatures on the cheques concerned were forged by the said Awang *alias* Che Mah bin Che Lob, yet I was satisfied that there was evidence adduced to prove on a balance of probabilities in this case that the signatures on the cheques were not those of the plaintiff's but were forged or placed thereon without the plaintiff's authority and were therefore wholly inoperative. I agreed with Encik Hisham, counsel for the plaintiff, that where the signature on a cheque is forged there was therefore no mandate to the bank (see *London Joint Stock Bank Ltd* v *Macmillan & Arthur*[2]). If a banker pays such a cheque, he pays without a mandate and cannot debit his customer's account. In this connection I would refer to the case of *Kepitigalla Rubber Estates Ltd* v *National Bank of India Ltd.*[3] In that case, the secretary of a company forged the signatures of two of its directors on a number of cheques. The defendants, who were the company's bankers, paid those cheques and the plaintiffs contended that the cheques were paid without its authority. The bank on its part contended that the customer was under a duty to keep his cheque book under lock and key and if by his breach of duty, a third party is given the opportunity to forge the customer's signature, the loss must fall on the customer. The trial judge, Bray J, whilst acknowledging that there was a duty on the part of a customer to exercise care in drawing up his order, rejected the suggestion that there was a corresponding duty on the part of the customer to take reasonable precautions to prevent his servants from forging his signature. He was the view that it was unnecessary to imply such a term into the contract between a banker and his customer and that, as between two innocent parties, the banker was in a better position to bear the loss. His Lordship said, at p 1025:

> If the bank desire that their customers should make these promises they must expressly stipulate that they shall. I am inclined to think that a banker who required such a stipulation would soon lose a number of customers. The truth is that the number of cases where bankers sustain losses of this kind are infinitesimal in comparison with the large business they do, and the profits of banking are sufficient to compensate them for this very small risk. To the individual customer the loss would often be very serious; to the banker it is negligible.

Reference must also be made to the recent case of *Tai Hing Cotton Mill Ltd* v *Liu Chong Hing Bank Ltd & Ors*[4] in which case the extent of the duty of care of a bank customer towards his banker was, among other matters, considered by the court and it was held by the Privy Council, inter alia, that the business of banking was the business not of the customer but of the bank. They offer a service, which was to honour their customer's cheques when drawn upon an account in credit or within an agreed overdraft limit. If they pay out upon cheques which were not his, they are acting outside the mandate and cannot plead his authority in justification of their debit of his account. This is a risk of the service which it is their business to offer.

In this case the defendant had paid the said cheques without the plaintiff's mandate and must therefore bear the loss and cannot debit the plaintiff's account.

Another issue raised by Encik Shamsul Bahrain was concerned with procedure. He stated that it was a necessary condition for proceedings under O 14 of the Rules of the High Court 1980 to be supported by an affidavit which complied with O 14 r 2(1). He pointed out that the affidavit of the said Teh Ah Huay did not comply with O 14 r 2(1) and in particular Form 18 in that it did not state that the deponent verily believed that there was no defence to the action and that it was within his own knowledge that the said debt was incurred and was still due and owing. The point was raised by counsel for the defendant during argument in chambers on 23 September 1987, and counsel for the plaintiff in an effort to remedy the deficiency affirmed a supplemental affidavit sworn on 24 September 1987. During further argument in open court on 20 June 1988, Encik Shamsul Bahrain submitted that the plaintiff's counsel had no right to file the supplemental affidavit.

In reply to this point Encik Hisham referred to the affidavit of Teh Ah Huay *alias* Aishah bte M Eusoff Teh affirmed on 7 November 1986, and pointed out that it has been clearly stated therein that the debt is owing and due. Counsel then referred to the English Court of Appeal case of *Les Fils Dreyfus et Cie Societe Anonyme* v *Clarke*[5] where it was held that the court had jurisdiction to allow a defective affidavit filed in support of a summons under O 14 r 1 to be supplemented by further affidavits and that a defect could thus be cured. In that

case the original affidavit filed was defective in two respects, namely, that it neither verified the original debt nor verified the assignment of it, but the former defect had been cured by the subsequent affidavits and the latter defect had been cured by the production of the assignment before the master (*Begg* v *Cooper*[6]). It was therefore the submission of Encik Hisham that any defect in the original affidavit was not fatal to the application for final judgment and could be rectified and was so rectified by the filing of a corrective supplementary affidavit. Counsel also referred to the following passage in the *Supreme Court Practice 1985* Vol I at p 149:

> The evidence on an appeal to the judge in chambers should ordinarily be the same as it was before the master or district registrar; but since such an appeal is dealt with by way of an actual rehearing of the application which led to the order under appeal, and the judge treats the matter afresh as though it came before him for the first time, save that the party appealing has the right as well as the obligation to open the appeal, it would seem that the judge in his discretion is free to admit fresh evidence, and he frequently does so in the absence of special reasons (see *Evans* v *Bartlam* [1937] AC 73; *Krakauer* v *Katz* [1954] 1 WLR 278; [1954] 1 All ER 244, CA).

I have considered the short supplementary affidavit affirmed by Encik Ahmad Hisham Kamaruddin on 24 September 1987, wherein he has simply stated that he verily believed that the defendant had no defence to the plaintiff's claim and that the defence filed was for the purpose of delay and an abuse of the process of the court. I agreed that the filing of that short supplementary affidavit to cure a minor defect did not prejudice the defendant in any way and therefore accepted it.

Having considered the arguments of both counsel I confirmed my decision in chambers dated 23 December 1987, when I agreed with the learned senior assistant registrar that there were no triable issues in this case and that leave for judgment should be granted for the plaintiff to enter judgment against the defendant as prayed for.

Appeal dismissed.

Solicitors: *Messrs Skrine & Co; Messrs Hisham & Seow Si.*

Reported by *Wong Kim Fatt*

Syarikat Lean Hup (Liew Brothers) Sdn Bhd v Cheow Chong Thai

HIGH COURT (KUALA LUMPUR) – CIVIL APPEAL NO 11-9-1987
MUSTAPHA HUSSAIN J
26 MAY 1988

Contract – Housing developers – Contract not in terms prescribed by law – Parties unaware – Mutual mistake of law – Rectification – Housing Developers (Control and Licensing) Act 1966 – Specific Relief Act 1950, ss 30, 31, 32 & 33 – Housing Developers (Control and Licensing) Regulations 1982, Reg 12, Schedule E, cll 4(1) & 19

Land Law – Housing developers – Delivery of vacant possession – Whether includes connection of water and electricity supplies – Whether certificate of fitness for occupation necessary for delivery of vacant possession – Computation of damages for late delivery – Housing Developers (Control and Licensing) Act 1966 – Housing Developers (Control and Licensing) Regulations 1982, Schedule E, cll 4(1) & 19

The appellants, who were housing developers, had entered into a sale and purchase agreement with the respondent on 30 July 1982 in respect of a house in their housing project. The agreement was expressed to be subject to and in compliance with the Housing Developers (Control and Licensing) Act 1966 and the amendments thereto and the rules made thereunder. The agreement provided for delivery of vacant possession of the property to the respondent within 18 months of the date of the agreement and also that in the event of late delivery the appellants were to pay damages calculated on a daily basis at the rate of 8% pa on the purchase price from the agreed date of delivery up to the actual date of delivery.

The parties were unaware at the time of the making of the agreement that the Housing Developers (Control and Licensing) Regulations 1982 had come into force and which provided for a delivery period of 24 months and for damages to be calculated at the rate of 10% pa.

The appellants had issued a letter dated 20 September 1984 to the respondent stating that the house had been completed and asking her to collect the keys to the house. It was common ground that the practical completion of the house was effected on 22 September 1984. However, the water and electricity supplies were connected only on 20 February 1986. The respondent eventually commenced an action for damages for late delivery of vacant possession. At the time of the trial, ie 18 September 1986, the certificate of fitness for occupation had still not been issued.

The first question that arose was as regards the applicability of the Regulations to the contract and the second was as regards what constituted delivery of vacant possession. The standard form sale and purchase agreement prescribed by the Regulations provided that upon the vendor's architect certifying that the construction of the building had been completed and the purchaser having paid all the moneys payable, the vendor shall let the purchaser into possession but that such possession shall not give the purchaser the right to occupy the building and that the purchaser shall not occupy the building until the certificate of fitness for occupation was issued.

Held, dismissing the appeal: (1) It was the clear intention of the parties to comply with the provisions of the relevant law,